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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN CARLOS GARCIA,

Defendant and Appellant.

D073393

(Super. Ct. No. SCD253653)

APPEAL from a judgment of the Superior Court of San Diego County,
Kenneth K. So, Judge. Convictions affirmed, sentence vacated and remanded with
directions.

Lizabeth M. Weis, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Kelley A.
Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant Juan Carlos Garcia appeals from a judgment of conviction after a jury convicted him of carjacking, assault with a deadly weapon, unlawful taking and driving of a vehicle, and withholding a stolen vehicle.

On appeal, Garcia contends that the trial court committed prejudicial error, and violated his state and federal due process rights, by allowing a detective to testify that it was the detective's opinion that Garcia was the individual who could be seen in a surveillance video taken from a library, as well as in still photographs that were created from the surveillance video. Garcia contends that the trial court should not have permitted the prosecutor to elicit the detective's opinion as to the identity of the individual in the surveillance video because it "improperly invaded the province of the jury as factfinders and was the equivalent to his opinion on guilt." (Original formatting & some capitalization omitted.)

After he filed his opening brief, Garcia requested leave to file a supplemental brief to argue that, pursuant to Senate Bill No. 1393 (2017–2018 Reg. Sess.) (S.B. 1393), he is entitled to remand for resentencing to allow the trial court to exercise its discretion to strike a five-year prior serious felony enhancement. S.B. 1393 amends sections 667, subdivision (a) and 1385, subdivision (b), effective January 1, 2019, to give courts discretion to dismiss or strike a prior serious felony conviction for sentencing purposes. We granted Garcia's request to file a supplemental brief and allowed the People to respond to Garcia's supplemental argument.

By failing to object to the detective providing his opinion as to who could be seen on the videotape and in the still photographs on the grounds raised on appeal, Garcia forfeited his contentions regarding that matter on appeal. However, the prosecutor concedes, and we agree, that Garcia is entitled to a remand to allow the trial court to exercise its discretion to dismiss or strike the five-year prior serious felony enhancement. We therefore vacate Garcia's sentence and remand for resentencing.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

On the afternoon of June 7, 2013, E.F. was sitting in his car, which was parked in front of the Logan Heights Library in San Diego, as he waited for his daughter to arrive on a bus from school. As E.F. waited, he noticed a woman and a man, accompanied by a three or four-year-old child, come out of the library. The pair was about 30 feet away from E.F. and appeared to him to be arguing. E.F. watched the couple for a few seconds and then looked down at his phone because he planned to call or text his daughter to let her know that he was waiting for her. The man was Hispanic, about 5'6" tall, wearing black pants and a black sleeveless t-shirt, and appeared to E.F. to be 24 or 25 years old, but could have been younger. The woman also appeared to be Hispanic, had blonde hair, and was described by E.F. as "a little chubby." When E.F. looked up from his phone, he saw the woman and child get into the car that was parked in front of E.F.'s car. The man was trying to get into the car, but the woman took off in the car without the man. The

man looked at E.F., and E.F. looked in the man's direction at the same time. E.F. then looked down at his phone again.

Moments later, the man appeared at the driver's side window of E.F.'s car and spoke in Spanish to E.F., saying " 'Puto, who are you calling?' " E.F. replied, " 'Nobody, I'm waiting for my daughter.' " The man walked away, but then returned to E.F.'s car seconds later. This time, the man said in an aggressive manner, " 'Hey, fucker, who are you calling?' " E.F. testified that the man left again, but then returned. This time the man opened E.F.'s car door and E.F. saw that the man was holding a knife in his right hand. The knife was approximately 10 inches long, and "looked sharp and pointy." E.F. felt afraid. The man called E.F., " 'Puto' " again. E.F. dropped his phone, moved toward passenger side of the car, and opened the passenger door.

Before E.F. could get his feet onto the ground outside of the car, he felt the man grab his left foot. E.F. managed to get out of the car, at first falling out and then standing up. He could see the man sitting in the driver's seat of E.F.'s car. The man closed the passenger door and drove off in E.F.'s car, taking E.F.'s phone, wallet and tools with him. At that point, E.F. realized that he was injured; he had been stabbed in the leg.

S.N. had been driving by the library when she saw a man open E.F.'s car door while E.F. was inside of the car. She saw that the man had a knife and she knew that something was wrong. S.N. watched as the two men appeared to struggle. It seemed to her that the man outside of the car had been trying to get E.F. out of the car. S.N. observed the man get into the driver's side of the car and leave with E.F.'s car. E.F. was

on the sidewalk when S.N. approached him. S.N. called the police. E.F. was transported to the hospital by ambulance. At the hospital, he received stitches for the stab wound.

San Diego Police Detective John Smith began investigating the carjacking and stabbing that occurred at the Logan Heights Library. Detective Smith obtained surveillance video from the library taken on the day of the incident. The video did not show the carjacking because the view from the camera panned around the library grounds, "back and forth," but "wasn't panning on where the incident occurred" at the time of the incident. Smith was aware from the witness descriptions that he was looking at the video to find a Hispanic male in his twenties with a shaved head or close cut hair who was accompanied by a woman and a small child. Smith personally watched all of the video that had been provided to him by library staff, and he found images that matched the suspect, as well as the woman and child. Smith created several still photos from the video. Smith then went to the hospital and showed E.F. one of the still photographs derived from the video. E.F. said that the photograph showed the man who had stabbed him and had taken E.F.'s car.

Detective Smith tracked down the registered owner of the car that E.F. had seen the woman and child get into just before the incident. The owner of that car was D.N. Detective Smith and another officer made contact with D.N. and showed her several still images that he had obtained from the library surveillance video. D.N. told the officers that she recognized the car shown in the photographs as her own and that her daughter, who shared D.N.'s first name, sometimes used the car. D.N. also said that she believed the woman in the photographs was her daughter. D.N. also told the officers that she

believed the man in the photographs was Garcia, who had been dating D.N.'s daughter at that time.

Detective Smith investigated Garcia, including by looking at Garcia's photographs and postings on Facebook.¹ Smith found several photographs, including a group photograph that had been posted to Garcia's Facebook page sometime after June 7, 2013, that included a reference to Garcia being in Chicago with family; this photograph was admitted as an exhibit at trial. Based on information provided by Garcia's sister, K.T., Smith believed that Garcia was the third person from the left in the photograph. Some of his tattoos were visible in the photograph.

Another photo posted to Garcia's Facebook around the same time frame was admitted at trial; Smith found this photograph to be significant because he believed that it showed Garcia wearing the same black tank top as the tank top worn by the suspect in the video. Smith acknowledged that the person he believed to be Garcia in the two photographs was not bald, although the suspect from the surveillance video was bald; there was only a single Facebook photo, which was posted a year before the incident, in which the person he believed to be Garcia displayed a shaved head. Smith believed that Garcia's tattoos were consistent with those that could be seen on the suspect in the surveillance video. Garcia also had a scar on his left arm, and this scar was visible on the arm of the man seen in the surveillance video from the library.

¹ The parties stipulated that a number of photographs were photographs of Garcia, including photographs from 2003, 2004, and 2017. Garcia's hair and facial hair was different in each photograph.

Upon learning Garcia's identity in 2013, Detective Smith issued a warrant for Garcia's arrest. Garcia was not arrested until 2017.

Garcia's defense was that he was not the person who had been involved in the incident at the library and that the man in the library surveillance video was someone else. His sister, K.T., testified that in 2013, Garcia had long hair and was "chubby," not thin. K.T. suggested that the person in the surveillance video was one of her other brothers, Pedro, and not the defendant.

B. Procedural background

In late October 2017, a jury convicted Garcia of one count each of carjacking (Pen. Code,² § 215, subd. (a)); assault with a deadly weapon (§ 245, subd. (a)(1)); unlawful taking and driving of a vehicle (Veh. Code, § 10851, subd. (a)); and withholding a stolen vehicle (§ 496d). The jury also found true the allegation that during the commission of the carjacking, Garcia personally inflicted great bodily injury on the victim within the meaning of sections 12022.7, subdivision (a) and 1192.7, subdivision (c)(8), and that he personally used a dangerous and deadly weapon within the meaning of sections 1192.7, subdivision (c)(23), and 12022, subdivision (b)(2). In connection with the assault with a deadly weapon count, the jury found true the allegation that Garcia personally used a dangerous and deadly weapon within the meaning of section 1192.7, subdivision (c)(23), and that he personally inflicted great bodily injury on the victim within the meaning of sections 1192.7, subdivision (c)(8) and 12022.7, subdivision (a).

² Further statutory references are to the Penal Code unless otherwise indicated.

In a bifurcated proceeding, Garcia admitted that he had suffered (1) a prior serious felony conviction within the meaning of section 667, subdivision (a)(1), (2) a prison prior within the meaning of section 667.5, subdivision (b), and (3) a prior strike conviction pursuant to sections 667, subdivisions (b)–(i), 668, and 1170.12.

The court sentenced Garcia to a term of 20 years in state prison. The sentence comprised the midterm of five years on count 1, the carjacking count, doubled to 10 years as a result of the prior strike conviction, plus a consecutive three-year term for the personal infliction of great bodily injury enhancement (§ 12022.7, subd. (a)), a consecutive two-year term for the weapon enhancement (§ 12022, subd. (b)(2)), and a consecutive five-year term for the prior serious felony conviction (§ 667, subd. (a)(1)). The court also imposed but stayed, pursuant to section 654, additional terms corresponding with the other counts and enhancements.

Garcia filed a timely notice of appeal.

III.

DISCUSSION

A. *Garcia has forfeited his contentions regarding Detective Smith's opinion as to the identity of the person seen on the library surveillance video by failing to object on the specific grounds raised on appeal*

1. *Additional background*

At trial, Detective Smith testified at length about obtaining and viewing the video surveillance footage from the library. Smith watched the video and believed that he saw three people who matched the descriptions he had been given from the witnesses. Smith spent hours reviewing the video, and created several still photographs from the video.

Smith met with the victim at the hospital and showed him a still photograph that Smith had created from the surveillance video. The victim told Smith, " 'Yeah, that's the guy who did it.' "

During the investigation into the carjacking, Detective Smith also obtained photographs from Garcia's Facebook page. Smith testified about the time he spent and the efforts he took to examine the surveillance video and the still photographs he obtained from the video, as well as the time he took to review the photographs available on Garcia's Facebook page. The prosecutor then asked Smith, "Now, after viewing multiple photographs of the defendant that you have seen, the 2003 to 2017 photographs, which are court's [exhibits] 31 to 34, as well as the Facebook photographs[,] did you form an opinion as to who you believe the person on court's exhibit 47 [a still photograph taken from the surveillance video] was?" Defense counsel interjected, stating, "Objection, relevance." The court overruled the relevance objection, and Detective Smith answered, "Yes." The prosecutor then asked Smith, "Who is that person?" Defense counsel did not object, and Smith responded by identifying Garcia as the person seen in the photograph from the surveillance video. Smith then went on to testify that he had also personally met Garcia, and that this meeting "confirm[ed] [his] opinion that the person in court's [exhibit] 47 was" Garcia. Defense counsel registered no further objections to this line of questioning.

The prosecutor proceeded to show Detective Smith another court exhibit and asked Smith whether he recognized it. Smith replied that the exhibit was "a photograph taken in 2017 of [Garcia], the defendant sitting at the table here." The prosecutor asked

Smith whether he had taken the photograph and Smith replied, "I don't recall if I took it personally. I was there when they were taken. The officer that was helping me might have actually taken the photograph." The prosecutor asked, "So, the person who you witnessed the photograph being taken of, who was that person?" Smith replied that it was Garcia. When the prosecutor asked him to point out Garcia, Smith said, "The individual sitting at the defense table with the blue suit and gray tie." The prosecutor asked, "The same person that we've been identifying?" and Smith replied, "Correct." The prosecutor then asked, "And you're confident it was the same person?" Smith replied, "Yes." No objections were made.

The prosecutor recalled Detective Smith to testify in rebuttal. The prosecutor said to Smith, "Now, Detective, understanding that the defense has offered some court's exhibits in regards to tattoos on [one of Garcia's brothers]; correct?" Smith indicated he understood that the defense had offered these photographs, and then testified that he had never seen those photographs before. When asked whether those photographs "change[d] [his] opinion, at all, as to who the person is in the surveillance video, court's exhibit 7, and in all of the accompanying still photos that are from court's exhibit 7," Smith said, "No, it does not." When asked why not, Smith said, "Because I'm still 100 percent sure, in my mind, that that is [Garcia]." Smith proceeded to explain that the tattoos visible in exhibits 59 and 60, which showed Garcia's brother, "do not match the tattoos that I have seen on the body of the individual inside the library from the video from court's exhibit 7." Defense counsel did not object at any point during this line of questioning.

2. *Analysis*

Garcia argues that the trial court should not have permitted the prosecutor to elicit Detective Smith's "opinion testimony about the identity of the suspect in the surveillance video." In briefing, Garcia frames his contention on appeal as being that the court's error was in admitting improper "lay opinion" testimony. However, under the heading in which this contention is identified, Garcia's analysis encompasses at least three interrelated contentions: (1) that the lay witness opinion testimony provided by Detective Smith improperly invaded the province of the jury because the opinion evidence was an improper subject of lay witness testimony and effectively constituted an opinion on guilt, which is something about which a witness may not express an opinion; (2) that "there was no foundational showing that Smith had personal knowledge of Garcia at or before the date of the assault"; and (3) that because Smith was a police detective, the jury would be inclined to give his testimony "added weight," beyond what would be accorded to a nonofficer witness, making Smith's testimony more prejudicial than probative in these circumstances.³

³ Garcia mentions the potential prejudice of having Smith, a police detective, provide lay witness testimony in the section of the opening brief in which Garcia sets forth argument as to the potential prejudice that he claims to have suffered as a result of the trial court's admitting Smith's opinion as to the identity of the person in the surveillance video. In other words, Garcia makes this point in the section of his brief in which he argues that the trial court's erroneous admission of the evidence should be reversed because the error was prejudicial. However, to the extent that Garcia's brief may be read as contending not only that the admission of Smith's lay opinion as to identity was erroneous because it constituted improper lay opinion evidence and there was no foundation for that opinion, but also because it was more prejudicial than probative under

The record demonstrates that defense counsel did not object to Detective Smith's testimony on any of these specific grounds. Rather, a single "relevance" objection was made to one question posed to Smith by the prosecutor with respect to Smith's testimony regarding his identification of the individual in the library surveillance video. This relevance objection was insufficient to preserve the contentions that Garcia now raises on appeal.

"[A]s a general rule, 'the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.' [Citations.] This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights." (*In re Seaton* (2004) 34 Cal.4th 193, 198.) While an appellate court "is generally not prohibited from reaching a question that has not been preserved for review by a party" and may often exercise its discretion to do so (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6), this general rule does not apply "when the issue involves the admission (Evid. Code, § 353) or exclusion (*id.*, § 354) of evidence." (*Ibid.*) Indeed, Evidence Code section 353, subdivision (a) prevents an appellate court from reversing a conviction on the basis of the admission of evidence unless a specific and timely objection was made: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or

Evidence Code section 352, we address it as argument against the admission of that evidence and consider whether Garcia has forfeited this contention, as well.

to strike the evidence that was timely made and *so stated as to make clear the specific ground of the objection or motion*" (*Ibid.*, italics added.)

The requirement of an objection on specific grounds "gives both parties the opportunity to address the admissibility of the evidence so the trial court can make an informed ruling, and creates a record for appellate review." (*People v. Davis* (2008) 168 Cal.App.4th 617, 627 (*Davis*).) Making a specific objection in the trial court also gives the proponent of the evidence an opportunity to cure, if possible the alleged defect in the evidence. (*People v. Pearson* (2013) 56 Cal.4th 393, 438), or to forgo introducing all or some of the evidence. In other words, a specific objection gives the proponent of the evidence the opportunity to take "steps designed to minimize the prospect of reversal." (*People v. Morris* (1991) 53 Cal.3d 152, 187–188, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) " '[I]t is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial.' " (*Davis, supra*, at p. 627, italics omitted, quoting 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, pp. 444–445.)

Garcia's objection on the ground of "relevance" was not stated in such a way as to make clear that he was contending either that the prosecutor's question to Detective Smith regarding his opinion concerning the identity of the person in the surveillance video served to usurp the province of the jury and was akin to seeking his opinion as to Garcia's guilt, that the question sought to elicit a lay witness opinion on identity for which the foundational requirements had not been sufficiently laid, or that the question sought

testimony that would be more prejudicial than probative because it sought a police officer's opinion, which might carry undue weight with the jury. Further, the relevance objection did not give the court an opportunity to make an informed ruling, and it did not allow the People the opportunity to take steps to minimize the possibility of reversal on appeal. An objection to the relevance of Detective Smith's opinion as to the identity of the person in the surveillance video was therefore insufficient to preserve the objections to the admission of Detective Smith's testimony that Garcia raises on appeal. (See, e.g., *People v. Jackson* (2016) 1 Cal.5th 269 [relevance objection in the trial court did not preserve appellate claim that an officer's testimony lacked foundation]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1130 [objection on the basis of relevance does not preserve a claim under Evidence Code section 352]; see also *People v. Demetrulias* (2006) 39 Cal.4th 1, 22 ["An objection to evidence must generally be preserved by specific objection at the time the evidence is introduced; the opponent cannot make a 'placeholder' objection stating general or incorrect grounds (e.g., 'relevance') and revise the objection later in a motion to strike stating specific or different grounds"].) We therefore may not consider Garcia's challenge to the admission of Detective Smith's testimony regarding his opinion as to the identity of the person seen in the library surveillance video.

Garcia's related contention that the trial court's admission of Detective Smith's lay opinion as to the identity of the individual on the surveillance video also amounted to a violation of his state and federal due process rights is similarly forfeited. (See *People v.*

Ervine (2009) 47 Cal.4th 745, 783 [a defendant forfeits "his contention of constitutional error by failing to assert it below, except to the extent that the constitutional claim relies on the same facts and legal standards the trial court itself was asked to apply, and asserts merely that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution"].)

B. *Garcia is entitled to have the trial court exercise its discretion as to whether to impose or strike the five-year prior serious felony enhancement, under a new provision of law*

On September 30, 2018, the Governor signed S.B. 1393, which became effective on January 1, 2019. S.B. 1393 amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony enhancement for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.) Under the previous versions of these statutes, the trial court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (former § 667, subd. (a)(1)). The court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667" (former § 1385, subd. (b)).

Garcia contends that S.B. 1393 applies retroactively to all cases or judgments of conviction in which a five-year enhancement term was imposed at sentencing based on a prior serious felony conviction, provided the judgment of conviction was not final at the time S.B. 1393 became effective on January 1, 2019, and that a remand for a new

sentencing hearing is therefore required. The People concede the issue and agree that the new law applies to allow the trial court to determine "whether to use its newly conferred discretion to strike [Garcia's] prior serious felony conviction" because his judgment was not final at the time the law went into effect.

In a recent case involving a defendant with the same name as the defendant in this case, another division of this district agreed with the position taken by the parties in this appeal and held that "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended [S.B.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when [S.B.] 1393 becomes effective on January 1, 2019." (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973 (*Garcia*)). We agree with the *Garcia* court's analysis, as well as its conclusion. We therefore accept the People's concession that the amendments to S.B. 1393 apply retroactively to Garcia's case, and that those provisions entitle him to resentencing. Remand is therefore appropriate to allow the trial court to resentence Garcia and to exercise its new discretion with respect to whether to strike the five-year prior serious felony enhancement.⁴

⁴ We do not intend to suggest that the trial court should exercise its discretion to strike the enhancement at issue here; we express no view as to the propriety of such a decision. We remand solely to allow the trial court the opportunity to exercise its discretion.

IV.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated, and the matter is remanded for resentencing. Upon resentencing, the court shall consider whether to exercise its discretion to strike Garcia's prior serious felony enhancement.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.